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## FREEDOM OF CONTRACT AND THE COLLECTIVE BARGAINING AGREEMENT

HARRY H. WELLINGTON †

Among the many competing goals of national labor policy, two have been frequently proclaimed and staunchly defended, almost but never quite to the death, by the Supreme Court of the United States. One is industrial peace;<sup>1</sup> the other is freedom of contract<sup>2</sup>—collective contract, to be sure.<sup>3</sup> Both goals indeed are embedded deeply in the myth and in the reality of national labor policy.<sup>4</sup>

† Professor of Law, Yale University. A.B. 1947, University of Pennsylvania; LL.B. 1952, Harvard University. This Article is a revised version of an address delivered on November 1, 1963, at the Southwestern Legal Foundation's Tenth Annual Institute on Labor Law.

<sup>1</sup> See, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>2</sup> See, e.g., *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

<sup>3</sup> Once a union is designated by a majority of employees in an appropriate unit as collective bargaining representative, the employer must bargain with the union over wages, hours, and other terms and conditions of employment, notwithstanding the existence of individual contracts of hire. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. . . . [W]herever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

*Id.* at 337.

<sup>4</sup> E.g., "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

"The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

It is hardly surprising that industrial peace is a proclaimed labor policy goal. But it may seem surprising to some that freedom of contract shares this distinction. No one thinks of the collective bargaining agreement as the perfect example of a free contract. In labor relations there is no freedom of choice, for example, with respect to one's contracting partner.<sup>5</sup> Nor are the parties free to contract in any way they wish about union security;<sup>6</sup> and about hot cargo, they often may not contract at all.<sup>7</sup> Of course, the examples can be multiplied.<sup>8</sup>

Freedom of contract is nevertheless a relevant concept for understanding the collective bargaining agreement, since the parties should be free to write their own terms and conditions of employment.<sup>9</sup> Perhaps this is another way of stating the ideal of free collective bargaining. And as so stated, it should be perceived as one of the important goals of national labor policy.

Inevitably, some tension exists, at least in the short run, between freedom of contract and industrial peace. Freedom of contract in the form of free collective bargaining may, from the perspective of history,

<sup>5</sup> Labor Management Relations Act (Taft-Hartley Act) §9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958) [hereinafter cited as LMRA], provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

<sup>6</sup> LMRA §8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (Supp. III, 1962).

<sup>7</sup> Labor-Management Reporting and Disclosure Act §8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. III, 1962) [hereinafter cited as LMRDA].

<sup>8</sup> For example, the power of the National Labor Relations Board and the courts to designate mandatory subjects of bargaining restricts freedom of contract. It can force negotiation over issues that otherwise might be excluded from deliberation. This in turn may have an impact upon the substantive terms of the contract. See *Richfield Oil Corp. v. NLRB*, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956) (stock purchase plan); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (retirement and pension plan); *NLRB v. J. H. Allison & Co.*, 165 F.2d 766 (6th Cir.), cert. denied, 335 U.S. 814 (1948) (merit wage increase); cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (ballot clause).

The Supreme Court, however, has mitigated this intrusion upon freedom of contract to some extent by holding that a party may bargain to an impasse for a contract provision giving it unilateral control over a mandatory subject. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). Compare *Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950), with *Findling & Colby, Regulation of Collective Bargaining by the NLRB—Another View*, 51 COLUM. L. REV. 170 (1951).

<sup>9</sup> The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

*NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952). (Footnotes omitted.)

be more productive of peaceful industrial relations than its alternatives,<sup>10</sup> but when such collective bargaining—during either negotiation or administration of the collective agreement—comes down to economic struggle, as it sometimes does, industrial peace is sacrificed.<sup>11</sup>

The courts often have been assigned the task of achieving an accommodation between these sometimes incompatible policy goals,<sup>12</sup> as when these goals seem to conflict in the enforcement of the collective bargaining agreement.<sup>13</sup> It is, therefore, in terms of industrial peace and freedom of contract that I should like to examine the emerging law in this area as it has been elaborated in the recent decisions of courts, and particularly of the Supreme Court of the United States.<sup>14</sup> But first, what may seem to be a rather extensive detour is necessary. The apparent detour leads into the law of the duty to bargain (a problem in contract formation), and should afford a perspective for the consideration of the problems of contract enforcement, which are the major concern of this Article.

## I. THE DUTY TO BARGAIN AND THE TENSION BETWEEN INDUSTRIAL PEACE AND FREEDOM OF CONTRACT

If a union is able to organize a majority of employees in an appropriate unit, the National Labor Relations Act commands the employer to "bargain collectively with the representative of his employees . . . ." <sup>15</sup> As Professor Russell Smith observed, "the Congress which [in 1935] made the duty to bargain explicit for most employers did not make a substantial contribution to its meaning. That task was left to the new Labor Board and to the courts." <sup>16</sup>

<sup>10</sup> Faith in this proposition was one of the motivating forces that led to the enactment of the National Labor Relations Act. And the faith is embodied in the structure of the statute as subsequently amended. See LMRA § 1, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).

<sup>11</sup> And sometimes the public reaction is sharp. See generally Wellington, *Labor Disputes: When Should the Government Intervene?*, The New Republic, Jan. 11, 1960, p. 11.

<sup>12</sup> See, e.g., *International Union, UMW (Boone County Coal Corp.)*, 117 N.L.R.B. 1095 (1957), *enforcement denied*, 257 F.2d 211 (D.C. Cir. 1958); *United Mine Workers (Westmoreland Coal Co.)*, 117 N.L.R.B. 1072 (1957), *enforcement denied*, 258 F.2d 146 (D.C. Cir. 1958).

<sup>13</sup> See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>14</sup> See cases cited note 13 *supra*.

<sup>15</sup> National Labor Relations Act § 8(a)(5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a)(5) (1958) [hereinafter cited as NLRA].

<sup>16</sup> Smith, *The Evolution of the "Duty To Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1089 (1941). See generally Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

The Labor-Management Relations Act extended the duty to unions,<sup>17</sup> and outlined its meaning. Section 8(d) provides that:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .<sup>18</sup>

But the principal task of elaboration was left for the Board and the courts—an elaboration that demands inquiry into the purposes of a statutory duty to bargain and the means by which those purposes are to be enforced. Such an inquiry quickly exposes the tension between the statute's pursuit of industrial peace and its insistence upon freedom of contract.

To begin with, there is what can best be described as the duty's passive or supportive purpose. In the absence of a requirement of good faith negotiation, collective bargaining may never occur. Either the employer or, in some special situations, the union may unilaterally impose the terms and conditions of employment. The statutory scheme of protecting organization from unfair practices and of allowing employee choice between union and no-union in such a situation would be frustrated.<sup>19</sup> History, moreover, suggests that frustration leads to industrial combat.<sup>20</sup> The Senate Committee Report that accompanied the NLRA stated the passive function of the duty to bargain in this way:

It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize

<sup>17</sup> LMRA § 8(b) (3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (3) (1958).

<sup>18</sup> 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

<sup>19</sup> The bill which became the Wagner Act included no provision specifically imposing a duty on either party to bargain collectively. Senator Wagner thought that the bill required bargaining in good faith without such a provision. However, the Senate Committee in charge of the bill concluded that it was desirable to include a provision making it an unfair labor practice for an employer to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of requiring an employer to recognize a union selected by his employees as their representative. It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement.

NLRB v. Insurance Agents' Union, 361 U.S. 477, 483 (1960). (Footnote omitted.)

<sup>20</sup> See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937).

such representatives as have been designated . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.<sup>21</sup>

A governmentally imposed duty to bargain, however, also may have an active or independent purpose. If a union and an employer are required to explain their respective positions, to listen to reasoned argument, and to pursue the quest for agreement with sincerity, the chance for agreement without warfare may be enhanced.<sup>22</sup> This is the faith that supports an active role for the duty to bargain. Its ultimate goal, of course, is the maintenance of industrial peace. In 1902, the Industrial Commission, in a report to Congress, expressed the faith in this way:

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.<sup>23</sup>

An inescapable question that the lawyer is likely to ask is how either a passive or an active duty to bargain can be enforced. Professor Smith insisted that "as a practical matter, a 'duty to bargain' must, in order to be capable of enforcement, be given a *special* definition."<sup>24</sup> He suggested two possibilities: "(1) that it be deemed simply to require union recognition and negotiation; (2) that it be deemed to require that plus the making of objectively reasonable proposals."<sup>25</sup>

The pressure for governmental interference with freedom of contract generated by the goal of industrial peace contained in a passive duty to bargain is perhaps satisfied by Professor Smith's first defini-

<sup>21</sup> S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935).

<sup>22</sup> See, e.g., *Prudential Ins. Co.*, 119 N.L.R.B. 768 (1957), *order set aside sub nom. Insurance Agents' Union v. NLRB*, 260 F.2d 736 (D.C. Cir. 1958) (per curiam), *aff'd*, 361 U.S. 477 (1960).

<sup>23</sup> H.R. Doc. No. 380, 57th Cong., 1st Sess. 844 (1902).

<sup>24</sup> Smith, *supra* note 16, at 1108.

<sup>25</sup> *Ibid.*

tion, namely, "union recognition and negotiation." A passive duty to bargain has as its purpose only the support of freely exercised employee choice. Hopefully, free collective bargaining will then lead to industrial peace; but the establishment of free collective bargaining, when the employees desire it, is itself the central goal. As Senator Walsh remarked in 1935:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and this bill does not seek to inquire into it.<sup>26</sup>

But Professor Smith's first definition will not satisfy the pressure for governmental interference with freedom of contract generated by the goal of industrial peace contained in an active duty to bargain. An active duty to bargain demands that the Government march past Senator Walsh's door. Negotiation alone is not enough. The quest for industrial peace demands that negotiation be conducted in a proper fashion. The parties must explain their respective positions, listen to reasoned arguments, and pursue the search for agreement with sincerity and in genuine good faith. It may be quite difficult for the union or employer that acts in a seemingly unreasonable manner to persuade the National Labor Relations Board or a court that it has negotiated in this proper fashion. The pressure on the parties, therefore, is towards reasonable behavior; the tendency on the part of the NLRB is to expect reasonable behavior.<sup>27</sup> Thus, Professor Smith's second definition for a duty to bargain requires, as a practical matter, "the making of objectively reasonable proposals." To this definition should be added the requirement of objectively reasonable bargaining procedures and practices. Of course it is the Government that decides, through the NLRB and the courts, what are and what are not reasonable proposals, procedures, and practices.

This has a twofold significance. First, it means a commitment, in a quest for industrial peace, to a theory of human behavior that may or may not be more valid than it is invalid. It may not be possible to assert with assurance that the pressure toward agreement without warfare is enhanced by requiring employers and labor organizations to behave toward one another in a fashion deemed reasonable

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<sup>26</sup> 79 Cong. Rec. 7660 (1935). Senator Walsh was the Chairman of the Senate Committee on Education and Labor. His remarks were made during debate of the bill that became the National Labor Relations Act.

<sup>27</sup> See Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 675 (1943).

by the Government.<sup>28</sup> Second, it means an extensive sacrifice of freedom of contract. The enforcement of reasonable behavior results in control over the substantive terms of the collective agreement.<sup>29</sup> (Would it, for example, be reasonable today for a union to resist including a no-strike clause in a contract?) In the pursuit of industrial peace, this sacrifice might be tolerable if there were reason to suppose that the Government knows better than the parties what the substantive terms of the collective bargaining agreement should be. But all relevant experience suggests that this is not the case.<sup>30</sup> And experience confirms the received theory underlying the law's general commitment to freedom of contract. Professor Kessler's summation of this dogma is splendid.

To keep pace with the constant widening of the market the legal system has to place at the disposal of the members of the community an ever increasing number of typical business transactions and regulate their consequences. But the law cannot possibly anticipate the content of an infinite number of atypical transactions into which members of the community may need to enter. Society, therefore, has to give the parties freedom of contract . . . . [The application of the rules of the common law of contract] . . . has to depend on the intention of the parties or on their neglect to rule otherwise . . . . Beyond that the law cannot go. It has to delegate legislation to the contracting parties. As far as they are concerned, the law of contract has to be of their own making.

Thus freedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system.<sup>31</sup>

Further, even if Government were indeed wiser than the parties, the cost of substituting governmental decision-making for private decision-making should not be ignored by a society that depends, as ours does, upon plural power centers to sustain its democracy.<sup>32</sup> The ineluctable tendency of the times may be to shift power from private groups to Government, but if democracy is to survive, this shift must be resisted unless the expectation of gain is substantial. Such expecta-

<sup>28</sup> A number of the problems that would be created by such a requirement are explored in Cox, *supra* note 16, at 1435-42.

<sup>29</sup> See Dodd, *supra* note 27, at 675.

<sup>30</sup> See generally TAYLOR, *GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS* (1948).

<sup>31</sup> Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-30 (1943).

<sup>32</sup> "Democracy in large measure rests on the fact that no one group is able to secure such a basis of power and command over the total allegiance of a majority of the population that it can effectively suppress or deny the claims of groups it opposes." LIPSET, TROW & COLEMAN, *UNION DEMOCRACY* 411 (1956).

tion would not seem justified by the theory that supports an active duty to bargain.

## II. THE DUTY TO BARGAIN AND THE SUPREMACY OF FREEDOM OF CONTRACT

I have described two functions of a duty to bargain—one passive, the other active—in a way that makes them appear to be polar extremes. The logic of each supports this description. However, day-by-day adjudication may lead, day by day, to accommodation. And so it has been with the duty to bargain. In fact, today there neither exists a passive nor an active duty, but one containing elements of both.

Nevertheless, it seems fair to assert that in elaborating the duty to bargain the courts have been nicely sensitive to and graciously solicitous of freedom of contract. Indeed, the principal, but not the single, explanation for a definition of a duty to bargain that goes beyond requiring only "recognition and negotiation" is that such a definition may fall short of achieving the passive function of the duty, namely, support of free collective bargaining.<sup>33</sup> The employer who does not wish to bargain collectively could, under a definition requiring only negotiation, bargain with what amounts to a fixed determination not to reach agreement,<sup>34</sup> with a determination to precipitate a strike or other event that would destroy the weak union. For this reason, the duty to bargain from the outset—first in case law and then by statute—became a duty to bargain in good faith.<sup>35</sup>

The requirement that the parties bargain in good faith could have easily become a requirement that the parties make "objectively reasonable proposals" and employ "objectively reasonable practices and procedures," since a good faith state of mind, or the lack of it, must be inferred from the acts of the parties.<sup>36</sup> And had reasonableness become the test, the consequence would have been the same as that which flows from an active duty to bargain—a substantial interference by Government with freedom of contract. Moreover, since there is some evidence of a tentative judicial commitment to an active duty to bargain,<sup>37</sup> one

<sup>33</sup> The purpose of a duty to bargain "is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union. Decisions under this provision reflect this." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 484-85 (1960).

<sup>34</sup> See, e.g., *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

<sup>35</sup> See, e.g., *NLRB v. Griswold Mfg. Co.*, 106 F.2d 713 (3d Cir. 1939); see text accompanying note 18 *supra*.

<sup>36</sup> See generally Smith, *supra* note 16.

<sup>37</sup> See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). *Truitt* holds that when an employer pleads poverty in response to a union's request for a wage increase, he must, upon demand, open his books to the union. The majority opinion uses the language of good faith. But it is clear, as Mr. Justice Frankfurter's separate opinion suggests, that good faith is not the issue. See Cox, *supra* note 16, at 1430-35.



might well have thought that good faith and objectively reasonable behavior were destined to merge and to lead to a sacrifice of freedom of contract. That this has not happened in any substantial measure is traceable to generally wise judicial review, and particularly to the wisdom in decision and expression of the Supreme Court.

The expression has set a mood—a mood reflected perhaps in these quotations:

The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.<sup>38</sup>

The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.<sup>39</sup>

It must be realized that collective bargaining, under a system where the government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values.<sup>40</sup>

This mood supports what I believe to be the best approach to the problem of the duty to bargain. The statute is violated, Judge Magruder tells us, when one of the parties bargains in a fashion that discloses “a desire not to reach an agreement . . . .” Of course,

if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken . . . in the course of bargaining negotiations . . . . Thus if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith . . . .<sup>41</sup>

Judge Magruder's formulations are an approach reflecting a mood and not a definition. That the reasonableness of proposals, practices,

<sup>38</sup> *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943).

<sup>39</sup> *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

<sup>40</sup> *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 488-89 (1960).

<sup>41</sup> *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

and procedures is not to be ignored by the NLRB is patent. But the approach surely is gentle to freedom of contract. An employer or a union can be very unreasonable without violating the statute. By and large, only the party bargaining with a desire not to reach agreement is guilty of an unfair practice.<sup>42</sup> From time to time concern with freedom of contract allows even such a wrongdoer to escape without sanction.<sup>43</sup>

It has been in the area of the regulation of union bargaining practices that the Supreme Court has been sharpest in protecting freedom of contract. The contrast between the Court's performance here and its performance in the contract enforcement cases makes it appropriate, therefore, that this detour into the law of the duty to bargain end with a short discussion of the *Insurance Agents'* case.<sup>44</sup>

During otherwise good-faith contract negotiation between the Prudential Insurance Company and the Insurance Agents' International Union, the union had its members "participate in a 'Work Without a Contract' program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company." <sup>45</sup> For example, union members refused "for a time to solicit new business," <sup>46</sup> "to comply with the company's reporting procedures," <sup>47</sup> and to participate in a company business campaign. The agents reported late for work, distributed leaflets, and appealed to policyholders to support their cause. In short, union member-agents engaged in a partial strike, the equivalent of a slowdown or intermittent work stoppage in an industrial establishment.<sup>48</sup> Prudential complained that this constituted a refusal to bargain, and the NLRB

<sup>42</sup> See, e.g., *Majure v. NLRB*, 198 F.2d 735 (5th Cir. 1952).

<sup>43</sup> See, e.g., *NLRB v. Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960).

<sup>44</sup> *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

<sup>45</sup> *Id.* at 480.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> The Board made much turn on this. "The Board freely (and we think correctly) conceded here that a 'total' strike called by the union would not have subjected it to sanctions under § 8(b) (3) . . . ." *Id.* at 491.

The Board contends that the distinction between a total strike and the conduct at bar is that a total strike is a concerted activity protected against employer interference by §§ 7 and 8(a) (1) of the Act, while the activity at bar is not a protected concerted activity. We may agree *arguendo* with the Board that this Court's decision in . . . *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, establishes that the employee conduct here was not a protected concerted activity. On this assumption the employer could have discharged or taken other appropriate disciplinary action against the employees participating in these 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics.

*Id.* at 492-94. (Footnotes omitted.) The Court, however, was not impressed with this line of reasoning. It said: "But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith." *Id.* at 494.

sustained the company's position. In effect, the Board held that the union's work without a contract program was a per se violation of section 8(b)(3) of the act, supporting its holding with the assertion that the union's program was not consistent with reasonable bargaining practices or procedures. "[R]eliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the company to capitulate to its terms," the Board contended, "is the antithesis of reasoned discussion . . . [required by the statute]." <sup>49</sup> Such tactics, the Board claimed are not "traditional" or "normal." Indeed, they are subject to the public's moral condemnation. <sup>50</sup>

The Supreme Court would have none of this.

[W]e think the Board's approach involves an intrusion into the substantive aspects of the bargaining process . . . . [I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. <sup>51</sup>

The *Insurance Agents'* case and this statement are perhaps the high watermark for freedom of contract in modern labor-management relations.

### III. ENFORCEMENT OF THE COLLECTIVE BARGAINING AGREEMENT AND THE TENSION BETWEEN INDUSTRIAL PEACE AND FREEDOM OF CONTRACT

I have argued that achieving balance between the policies of industrial peace and freedom of contract is a central task in the

<sup>49</sup> *Id.* at 482.

<sup>50</sup> *Id.* at 495.

<sup>51</sup> *Id.* at 490. The Supreme Court's decision in *Insurance Agents'* seems to have put to rest a doctrine closely related to that of the Board's in the principal case—namely, that an economic strike in violation of contract is a refusal to bargain in good faith under § 8(b)(3) and § 8(d). *International Union, UMW (Boone County Coal Corp.)*, 117 N.L.R.B. 1095 (1957), *enforcement denied*, 257 F.2d 211 (D.C. Cir. 1958); *cf. United Mine Workers (Westmoreland Coal Co.)*, 117 N.L.R.B. 1072 (1957), *enforcement denied*, 258 F.2d 146 (D.C. Cir. 1958). In *Lumber Workers*, 130 N.L.R.B. 235, 242 (1961), the Board said: "The Trial Examiner found that the strike . . . was in violation of the no-strike clause in the contract . . . and therefore constituted a refusal to bargain. Assuming without deciding that the strike did violate the no-strike clause, we find on the basis of the Supreme Court's decision in the *Prudential Insurance* case that such conduct did not also constitute a violation of Section 8(b)(3) of the Act." (Footnote omitted.)

elaboration of a statutory duty to bargain. The same is true for the enforcement of the collective bargaining agreement. But whereas freedom of contract has—and, as I think, properly—dominated the law of the duty to bargain, it has been the noble quest for industrial peace that has captured the law of contract enforcement.

Serious federal enforcement of the collective bargaining agreement dates from *Lincoln Mills*.<sup>52</sup> That celebrated case held that Section 301 of the Labor-Management Relations Act<sup>53</sup> empowers a district court to order specific performance of the arbitration promise in a collective agreement. The Court in its *ipse dixit* also announced that “the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policies of our national labor laws.”<sup>54</sup> These policies include the goals of industrial peace and freedom of contract. Indeed, in *Lincoln Mills*, the Court’s opinion placed substantial reliance upon the legislature’s stated quest for industrial peace through contract enforcement. Mr. Justice Douglas quoted the following from the Senate Report:

“If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

“Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements . . . should be enforceable in the Federal courts.”<sup>55</sup>

Of course there is no suggestion in the legislative history of section 301 that the pursuit of industrial peace should carry with it a repudiation of the proposition—to quote from the opinion in the *Insurance Agents’* case—that “our labor policy is not . . . erected on

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<sup>52</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>53</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958), which provides: “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

<sup>54</sup> 353 U.S. at 456. See generally Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

<sup>55</sup> 353 U.S. at 454.

a foundation of government control of the results of negotiations.”<sup>56</sup> The legislative history of section 301 on many issues is cloudy;<sup>57</sup> here it is nonexistent.<sup>58</sup> Accordingly, to the extent that litigation under the section exposes tension between the policies of industrial peace and freedom of contract, the task of accommodation—even more than with the duty to bargain—is a task for the courts alone.

Since *Lincoln Mills*, three types of litigation have been of principal importance under the statute. One of these need not concern us. There is no issue of industrial peace versus freedom of contract in the cases dealing with the allocation of power among federal and state courts<sup>59</sup> and of jurisdiction between courts and the NLRB.<sup>60</sup> But such an issue may be at the bottom of the arbitration cases<sup>61</sup> and the cases involving a strike during the term of a contract.<sup>62</sup>

It is probably apparent why tension may be thought to exist between the goal of industrial peace and that of freedom of contract in litigation involving a strike during the term of an agreement. A rule of construction that strongly favors the finding of a no-strike pledge, may serve—or be thought to serve—as a deterrent to industrial warfare. Yet, if the rule of construction is unrelated to the sense of the collective agreement, the rule substitutes governmental decision-making for private decision-making, and is therefore an inescapable interference with freedom of contract.

It is less apparent, however, why tension may be thought to exist between industrial peace and freedom of contract when a case involves

<sup>56</sup> NLRB v. Insurance Agents' Union, 361 U.S. 477, 490 (1960).

<sup>57</sup> “The legislative history of § 301 is somewhat cloudy and confusing.” 353 U.S. at 452.

<sup>58</sup> The legislative history of § 301 is collected in an appendix to the dissenting opinion of Mr. Justice Frankfurter. 353 U.S. at 485-546.

<sup>59</sup> See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (state courts must apply federal primary law in § 301 actions); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (state courts have concurrent jurisdiction under § 301). See generally Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 556-61 (1959).

<sup>60</sup> *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). See generally *Sovern, Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963).

<sup>61</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

<sup>62</sup> *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). Cf. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962); *Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers*, 370 U.S. 254 (1962). The *Atkinson* and *Drake Bakeries* cases involve the question whether the arbitration or judicial forum is the proper forum in which to sue over a strike allegedly in breach of contract. They do not cast light on the freedom of contract—industrial peace question. Nor does *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), dealing with the injunctive remedy in federal courts. The issues in the *Sinclair* case involve subtle questions of statutory interpretation—of the relationship between Congress and the Court—questions that push to one side the freedom of contract—industrial peace problem. See generally, Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

enforcement of the promise to arbitrate. In a suit to compel arbitration the union usually is the plaintiff.<sup>63</sup> The underlying dispute that the union wants sent to arbitration is a dispute over the meaning of the agreement. For example, the employer may have classified certain jobs and the union contends that this act is a breach of the collective bargaining agreement. In the suit to compel arbitration, the union alleges that the employer is also in breach of the contract for refusing to submit the underlying dispute to an arbitrator; and the employer's answer is that he never promised to arbitrate a dispute over job classification.<sup>64</sup> An examination of what is likely to happen should the court find that the dispute over job classification is not subject to arbitration reveals the tension between the conflicting policies. Unlike commercial arbitration, the alternative to labor arbitration is not likely to be a judicial testing of the underlying dispute.<sup>65</sup> Theoretically, the union in the example could sue the employer under section 301, on the ground that the employer's action was in breach of contract. Actually—and for reasons that are not very clear to me—it would be surprising if such a course were followed.<sup>66</sup> The union is likely either to accept the employer's action, or, if the issue is thought important enough, to strike.<sup>67</sup> Accordingly, since strike may be the alternative to arbitration, the goal of industrial peace invites the judiciary to fashion a rule of construction that gives generous scope to the arbitration promise. And, if that rule of construction departs from the sense of the collective agreement, it will be a rule that results in "government control of the results of negotiations." It will be a rule, in short, that sacrifices freedom of contract.

I should now like to examine the extent to which the Court in fact has fashioned rules of construction that give generous scope to the promise to arbitrate and the promise not to strike and then to inquire into the wisdom of these rules in light of the policies of industrial peace and freedom of contract.

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<sup>63</sup> It is the union that generally complains about action taken by the employer. Its complaint goes through the grievance procedure spelled out in the contract. At any stage of this procedure the dispute may be settled. If it cannot be settled by the parties, it then may go to arbitration. See CHAMBERLAIN, *COLLECTIVE BARGAINING* 96-119 (1951).

<sup>64</sup> Cf. *Local 149, Am. Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

<sup>65</sup> See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

<sup>66</sup> At one time it may have been that the unions were afraid of the courts. But surely that is no longer true. Nor is it likely that unions often refrain from litigation out of a concern for industrial harmony. The explanation may just be habit; and the habit may not last for long.

<sup>67</sup> Cf. Summers, *Labor Law Decisions of Supreme Court: 1961 Term*, in A.B.A. SECTION ON LABOR RELATIONS LAW, 1962 PROCEEDINGS 51.

#### IV. ENFORCEMENT OF THE COLLECTIVE BARGAINING AGREEMENT AND THE SUPREMACY OF INDUSTRIAL PEACE

*Lincoln Mills* was itself an action for specific performance of the promise to arbitrate. However, the opinions in the case did not address themselves to the question of the role of the judge in deciding whether to order arbitration.<sup>68</sup> Most state courts had approached this question as they might any question of contract interpretation;<sup>69</sup> and after *Lincoln Mills* most federal courts followed suit.<sup>70</sup> This approach at best is neutral to arbitration. It imposes on the judge an obligation to examine the promise to arbitrate in light of all admissible intrinsic and extrinsic evidence brought before the court, and then to decide whether the specific underlying dispute is within the ambit of the arbitration clause.

The propriety of this approach came before the Supreme Court in 1960 in a series of cases—the arbitration trilogy—involving the United Steelworkers of America.<sup>71</sup> The opinion in *Warrior & Gulf Nav. Co.*<sup>72</sup> is the Court's principal effort at reasoned elaboration, and accordingly, deserves principal attention. The underlying dispute in that case was over the contracting out of the bargaining unit of repair and maintenance work. The union contended that this act violated the employer's no-lockout pledge, and requested arbitration of the dispute. But the request was refused by the employer on the ground that the contracting out of work was strictly a function of management, and that the collective agreement in terms provided that, "matters which are strictly a function of management shall not be subject to arbitration."<sup>73</sup>

This argument, which was successful in the lower courts,<sup>74</sup> failed to persuade the Supreme Court. In ordering arbitration, the Court said:

<sup>68</sup> See generally Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

<sup>69</sup> See, e.g., *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947). *Cutler-Hammer* was explicitly rejected in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

<sup>70</sup> See, e.g., *Local 201, Int'l Union of Elec. Workers v. General Elec. Co.*, 262 F.2d 265 (1st Cir. 1959); *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958). See generally, Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1281-1300 (1959).

<sup>71</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

<sup>72</sup> 363 U.S. 574 (1960).

<sup>73</sup> *Id.* at 576.

<sup>74</sup> The District Court granted respondent's motion to dismiss the complaint. 168 F. Supp. 702. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.<sup>75</sup>

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.<sup>76</sup>

Several reasons were advanced by the Court to support this rule of construction. As a matter of ordinary contract law, the question of whether the underlying dispute is subject to arbitration, and the merits of that dispute, are usually intertwined. Thus, in *Warrior*, the dispute over the contracting out of maintenance and repair work is not comprehended by the arbitration clause if, as the employer argued, contracting out is "strictly a function of management." Whether contracting out is "strictly a function of management," however, is also the central issue on the merits. For, if it is "strictly a function of management," the employer in contracting out work exercised power delegated to him under the agreement. He, therefore, broke no promise. Accordingly, the Court reasoned that since, as a matter of comparative competence, the labor arbitrator has a substantial advantage over the lay judge, every opportunity ought to be utilized to allow the better

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the right to review the defendant's business judgment in contracting out work." . . . It further held that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." . . . The Court of Appeals affirmed by a divided vote, 269 F.2d 633, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting out fell in that exception.

*Id.* at 577. The majority opinion in the Supreme Court repeatedly confuses—as perhaps the Court of Appeals did—the grievance procedure and arbitration. Arbitration, of course, is the terminal step in the grievance procedure. A dispute that is not within the ambit of the arbitration promise, however, may still be a dispute that is subject to the other steps of the grievance procedure—steps that impose on the parties an obligation to try and reach a negotiated settlement of their differences, but do not impose upon them the obligation of submitting the dispute, if it cannot be resolved, to binding determination by a third party.

<sup>75</sup> 363 U.S. at 582-83.

<sup>76</sup> *Id.* at 584-85.



qualified decision-maker to pass upon the central issue in the case.<sup>77</sup> The rule of construction announced by the Court admirably accomplishes this end.

The second reason adduced by the Court to support its rule is the statutory policy of industrial peace: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."<sup>78</sup> Thus is arbitration linked to industrial peace. And it is this link that supports much of the law of section 301.

Finally, the Court insists that its rule of construction is consistent with the policy of freedom of contract. It is a rule which is supposedly responsive to the intentions of the contracting parties. The Court states that, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."<sup>79</sup>

But whatever the reasoning of the Court, the majority opinion makes clear that in a suit to compel arbitration there is to be no thoroughgoing judicial inquiry into whether the reluctant party in this case promised to submit this dispute to arbitration. Moreover, in the companion *Enterprise* case,<sup>80</sup> the Court makes it equally clear that the reluctant party is not to have serious judicial consideration of this question in a post-arbitration proceeding—one to enforce, or set aside, the arbitrator's award. Said the Court: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."<sup>81</sup> But the issue on the merits and the issue of whether the particular dispute is comprehended by the arbitration clause usually are bound together. In *Warrior*, both issues turn on whether contracting out is "strictly a function of management." To deny review to one question is to deny review to both.

The Court is less than illuminating about the reason for the *Enterprise* rule. It seems to assume that the *Warrior* rationale retains its original persuasiveness in a post-arbitration case.<sup>82</sup> Surely, however, at least one of the stated reasons for *Warrior* has little application

<sup>77</sup> See Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1281-1300 (1959).

<sup>78</sup> 363 U.S. at 578.

<sup>79</sup> *Id.* at 582.

<sup>80</sup> *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>81</sup> *Id.* at 596.

<sup>82</sup> As we stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, . . . the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

*Id.* at 596. (Footnote omitted.)

after an arbitrator has held his hearing and issued his award. It may be true that the arbitrator is better qualified than the court to decide whether contracting out is "strictly a function of management." But after an arbitrator has made the determination, there is no reason why his decision should not be subject to judicial review. The comparative competence doctrine that supports *Warrior* ought to be considered in much the same way as the doctrine of primary jurisdiction in administrative law. Thus, an arbitrator initially may be better able than a court to inform himself about the content of the phrase "strictly a function of management." He may have experience which makes it easier for him to understand the relevance of past practices. He may have a feel for the common law of the plant that the judge lacks. Moreover, he may be able to proceed in a more informal and leisurely fashion than the judge in a prearbitration hearing.

But these considerations do not suggest that a court lacks competence to review what the arbitrator has done in light of what the arbitrator has said.<sup>83</sup> Indeed, it is quite improper, where contempt of court and ultimate imprisonment are at stake, for a court to rubber-stamp the decision of a private arbitrator when the reluctant party, from the beginning, has insisted that he never agreed to allow the arbitrator to decide the dispute.<sup>84</sup>

I have suggested that the Court has given generous scope to the arbitration promise in collective bargaining agreements. No less generosity has been lavished upon the no-strike promise. Indeed, the promise itself has been manufactured seemingly by judicial magic.

*Lucas Flour*<sup>85</sup> is the case of principal importance. A collective agreement provided for arbitration over "any difference as to the true interpretation of this agreement," and also stated that, "during such arbitration, there shall be no suspension of work." Another paragraph of the arbitration article provided that, "should any difference arise between the employer and the employee, same shall be submitted to arbitration . . . ." Nothing was said in this latter paragraph about work stoppages.<sup>86</sup>

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<sup>83</sup> The Court states, indeed, that: "When the arbitrator's words manifest an infidelity to . . . [his obligation to make an award that 'draws its essence from the collective bargaining agreement'], courts have no choice but to refuse enforcement of the award." *Id.* at 597. But then, for reasons that are unclear, the Court asserts that: "Arbitrators have no obligation to the Court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *Id.* at 598. (Footnote omitted.)

<sup>84</sup> See generally Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. Rev. 471 (1962).

<sup>85</sup> *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

<sup>86</sup> *Id.* at 96.

A difference did arise between the employer and an employee. The employer fired an employee under an article in the agreement that reserved to management "the right to discharge" for unsatisfactory work.<sup>87</sup> In protest the union struck, but without success. The employer's action was upheld in subsequent arbitration, with both parties agreeing that the dispute was within the ambit of the arbitration article. The employer then sued the union in a state court for damages resulting from the strike and the Supreme Court granted certiorari.

The state tribunals, applying local contract law, held that the union had broken its contract by striking when it did.<sup>88</sup> The state courts' choice of law, the Supreme Court reasoned, was improper. *Lincoln Mills* had held that the primary rights and duties of the parties to a collective agreement were regulated by federal law when suit was brought in a federal court under section 301. Of course, primary rights and duties could not be governed by different laws merely because of the accident of the choice of a forum.<sup>89</sup> So much was obvious—inescapably so—but I should have thought no more. The Court, however, disposed of the merits with that wonderful effortlessness that, in the labor field at least, has become its latter-day hallmark. Of course the strike was in breach of contract, said the Court, for the agreement "expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration."<sup>90</sup> When such is the case, a no-strike promise is implied.

Two reasons were advanced without elaboration in support of this rule. One was freedom of contract: "To hold otherwise would obviously do violence to accepted principles of traditional contract law."<sup>91</sup> This assertion is without citation. The other reason, and explicitly the more important one, was industrial peace: "Even more in point," said

<sup>87</sup> *Ibid.*

<sup>88</sup> [T]he employer . . . brought . . . suit against the union in the Superior Court of King County, Washington, asking damages for business losses caused by the strike. After a trial that court entered a judgment in favor of the employer in the amount of \$6,501.60. On appeal the judgment was affirmed by Department One of the Supreme Court of Washington. 57 Wash. 2d 95, 356 P.2d 1. The reviewing court held that the pre-emption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, did not deprive it of jurisdiction over the controversy. The Court further held that § 301 . . . could not "reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied." 57 Wash. 2d, at 102, 356 P.2d, at 5. Expressly applying principles of state law, the Court reasoned that the strike was a violation of the collective bargaining contract, because it was an attempt to coerce the employer to forego his contractual right to discharge an employee for unsatisfactory work.

369 U.S. at 97-98. (Footnotes omitted.)

<sup>89</sup> For further elaboration see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 556-61 (1959).

<sup>90</sup> 369 U.S. at 105.

<sup>91</sup> *Ibid.*

the Court, "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."<sup>92</sup> This assertion is supported by a citation to *Warrior*. Thus are the arbitration and strike cases united by the quest for industrial peace and a purported respect for freedom of contract.

It is now proper to ask whether freedom of contract has been respected and whether it is likely that industrial peace has been advanced by this legislative program of the Court.

Mr. Justice Black dissented in *Lucas Flour*. He argued that the Court's holding marked a departure from the statutory policy of freedom of contract.

I have been unable to find any accepted principle of contract law—traditional or otherwise—that permits courts to change completely the nature of a contract by adding new promises that the parties themselves refused to make in order that the new court-made contract might better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation.<sup>93</sup>

Mr. Justice Black was clear that freedom of contract demanded a conclusion contrary to the Court's. He said:

Both parties to collective bargaining discussions have much at stake as to whether there will be a no-strike clause in any resulting agreement. It is difficult to believe that the desire of employers to get such a promise and the desire of the union to avoid giving it are matters which are not constantly in the minds of those who negotiate these contracts. In such a setting, to hold—on the basis of no evidence whatever—that a union, without knowing it, impliedly surrendered the right to strike by virtue of "traditional contract law" or anything else is to me just fiction.<sup>94</sup>

Mr. Justice Black surely seems correct. The no-strike pledge is a promise commonly found in collective bargaining agreements.<sup>95</sup> It has never been thought to be an unimportant promise.<sup>96</sup> Accordingly, it is hardly probable that the parties overlooked it, or that they assumed

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Id.* at 108.

<sup>94</sup> *Id.* at 109.

<sup>95</sup> One study suggests that ninety-four percent of collective agreements contain explicit no-strike pledges. Some pledges are very broad, some very narrow in terms. See 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS SERV. § 77 (1960).

<sup>96</sup> See Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3, 12.

that its inclusion in any way would be redundant. Yet, the parties did expressly agree to arbitrate the dispute. Might it not be said, therefore, that they must have meant that the dispute was not to be settled by economic combat? Is it not fair to assume that the parties chose arbitration as the exclusive remedy, and in so doing rejected alternative remedies?<sup>97</sup> This argument assumes that the parties established a dispute-settlement procedure that coincides with the Court's notion of a reasonable procedure. It is an argument that might be thought to make good sense if the events that took place in *Lucas Flour* were, at the time of contract formation, remote or unforeseeable. As Professor Fuller has observed, when courts, in finding implied terms in contracts, talk of intention, they frequently are not talking about "conscious and deliberate choice" but rather are discussing "the manner in which current mores and conceptions of fairness can be said to influence and shape the conduct of parties without their being aware of the existence of alternatives."<sup>98</sup> But Mr. Justice Black's unanswerable point is that in collective bargaining agreements the omission of a no-strike clause must itself be taken to be a "conscious and deliberate choice" of the parties.

It may seem unreasonable or unfair for a union to bargain hard and successfully for an arbitration promise and not give up its right to strike. It may also seem unreasonable for an employer to bargain hard and successfully for unilateral control over many of the terms and conditions of employment and for a no-strike pledge without giving in exchange a promise to arbitrate.<sup>99</sup> But here, as with the duty to bargain, the enforcement of reasonable behavior can only be at a sacrifice. And what is sacrificed here, even as what would be sacrificed there, is freedom of contract.<sup>100</sup>

What has been said about *Lucas Flour* can, I think, also ultimately be said about the arbitration cases. But the Court's intrusion upon the principles of freedom of contract in the arbitration cases is less clear cut because the problem itself is a more complicated one.

Prior to the Supreme Court decision in *Warrior*, most courts, when requested to order specific performance of the promise to arbitrate, inquired fully into whether the arbitration promise comprehended

<sup>97</sup> Cf. Summers, *Labor Law Decisions of Supreme Court: 1961 Term*, in A.B.A. SECTION OF LABOR RELATIONS LAW, 1962 PROCEEDINGS 51, 57.

<sup>98</sup> FULLER, BASIC CONTRACT LAW 764 (1947).

<sup>99</sup> It is clear that this would not violate the employer's duty to bargain. Cf. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). "Our labor policy is not presently erected on a foundation of government control of the results of negotiations." NLRB v. Insurance Agents' Union, 361 U.S. 477, 490 (1960). See text accompanying note 50 *supra*.

<sup>100</sup> See text accompanying notes 28-32 *supra*.

the particular underlying dispute.<sup>101</sup> No presumptions were indulged. Close attention to these decisions, however, suggests that the courts were not very successful.<sup>102</sup> In the opinion of a number of disinterested observers, the courts often failed to compel arbitration where a more sophisticated study of the underlying problem would have indicated that arbitration was appropriate.<sup>103</sup> Perhaps this is attributable to the nature of the collective bargaining agreement and the institutional difficulties that such a document is likely to pose for a court. In *Warrior*, the majority quoted the following from Professor Cox in making a similar point:

“[I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee’s claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.”<sup>104</sup>

Of course there are limits to this concept of a collective bargaining agreement, and it may be that the overwhelming presumption in favor of arbitration announced in *Warrior* goes too far.<sup>105</sup> But on the whole, I should think that *Warrior* serves the parties by effectuating their purpose at least as well, and probably better, than the old approach. And it must be admitted that a middle way is not easy to devise.<sup>106</sup>

<sup>101</sup> See cases cited notes 69-70 *supra*.

<sup>102</sup> See Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1281-1300 (1959).

<sup>103</sup> See, e.g., Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952); Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247 (1958).

<sup>104</sup> 363 U.S. at 579-80, quoting Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959).

<sup>105</sup> See Hays, *The Supreme Court and Labor Law October Term, 1959*, 60 COLUM. L. REV. 901, 919-35 (1960).

<sup>106</sup> Judge Magruder, a sensitive and creative judge, well grounded in labor-management relations, tried to devise such a middle way in a series of opinions written after *Lincoln Mills* and before *Warrior*. See, e.g., *Local 201, Int'l Union of Elec. Workers v. General Elec. Co.*, 262 F.2d 265 (1st Cir. 1959); *New Bedford*

But whatever the conclusion may be as to *Warrior's* impact upon freedom of contract when the rule of that case is contemplated in isolation, it seems clear that great freedom has been eroded by the joinder of *Enterprise* with *Warrior*. The consequence of these cases, which compel arbitration and enforce the arbitrator's award without any<sup>107</sup> serious judicial inquiry into whether the arbitration promise in fact reaches the underlying dispute, is to vest the arbitrator with a power that is limited only by the arbitrator's own understanding of his institutional responsibility. The arbitrator may see himself as, in effect, a private judge. The contract may be centrally important to him. He may, however, be more interested in maintaining production, bettering morale, or fostering industrial stability than he is in the language of the collective bargaining agreement. Indeed, the Court's opinion in *Warrior* invites just this. Mr. Justice Douglas said:

The parties expect that . . . [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective-bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.<sup>107</sup>

When the arbitrator concerns himself with these matters he may neglect to consider whether the parties agreed to arbitrate the particular dispute.<sup>108</sup>

The arbitration cases, in unleashing the arbitrator by diminishing the role of the courts, may upset the reasonable expectations of parties who with words tried to order the future in that fashion which they deemed, at the time of contract formation, to be best for them. Deci-

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Defense Prods. Div. v. Local 1113, UAW, 258 F.2d 522 (1st Cir. 1958); Boston Mut. Life Ins. Co. v. Insurance Agents' Union, 258 F.2d 516 (1st Cir. 1958); Local 149, Am. Fed'n of Technical Engrs v. General Elec. Co., 250 F.2d 922 (1st Cir. 1957), cert. denied, 356 U.S. 938 (1958). He was not completely successful. See Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1281-1300 (1959).

<sup>107</sup> 363 U.S. at 582.

<sup>108</sup> Arbitrators, who, some believe, are already all too prone to become industrial statesmen, will be further encouraged to decide cases, as the Court suggests, on the basis, not of the evidence and the agreement, but in accordance with their views of what will be most likely to increase production, heighten morale, and decrease tensions. It seems hardly necessary to point out that if, as the Court holds, an arbitrator has the power to decide a question to which both the agreement and the evidence establish that there is only one answer, he has the power to give the other answer. When the contract provides that the employer shall have the right to contract out, the arbitrator may decide that it will heighten morale or decrease tensions to prohibit contracting out. Of course it is equally true that when the contract provides for no contracting out, he might decide that it would increase production to permit the employer to contract out.

Hays, *supra* note 105, at 925-26.

sions that accomplish this result undercut freedom of contract. Some other important public policy must be served, therefore, if such decisions are to command support.<sup>109</sup>

I have argued that in dealing with the arbitration promise and the no-strike pledge of the collective bargaining agreement, the Court has fashioned rules which undercut the important labor policy of freedom of contract. I have suggested, however, that the Court has attempted to justify the rules it has fashioned by insisting that they advance the important quest for industrial peace. The Court's attempt to justify its performance invites speculation along two lines.

How important is the problem of industrial warfare during the life of a contract? And to what extent are the Court's rules likely to promote peace in industrial relations?

There is little reason to think that strikes, triggered either by the refusal of an employer to arbitrate an arbitrable grievance or by an employer's unilateral action that admittedly is subject to arbitration, are an important source of industrial unrest. Only a small number of arbitration proceedings require judicial intervention, and this was true before the Supreme Court's arbitration decisions.<sup>110</sup> This fact certainly is not surprising, since most parties are likely to comply with their agreement, and sanctions exist apart from law.<sup>111</sup> The relationship between the union and the employer is a continuing one, the harmony of which might be jeopardized by the failure of one party to stick to its promise. Moreover, if the employer declines to arbitrate, he invites the sanction of self-help in the form of a work stoppage. These deterrents mean that work stoppages are usually not necessary.<sup>112</sup> Nor is a union likely to strike—whether or not it has promised to refrain from so doing—over a dispute that an employer is willing to arbitrate. A strike is serious and costly. It is too much the ultimate weapon to receive other than the most infrequent use as a means of settling arbitrable grievances.<sup>113</sup> There is some irony, therefore, in the relentless concern of the Court with industrial peace in the contract enforcement cases and its only mild concern with that goal in the duty to bargain (contract formation) cases. The industrial warfare that

<sup>109</sup> See text accompanying notes 28-32 *supra*.

<sup>110</sup> Judicial procedures are rarely invoked either to compel arbitration or to confirm or vacate awards. American Arbitration Association, *Procedural and Substantive Aspects of Labor-Management Arbitration*, 12 ARB. J. (n.s.) 67, 77 (1957).

<sup>111</sup> The extent to which these propositions are true generally in our society is suggested in a recent study by Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

<sup>112</sup> See generally Shuman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

<sup>113</sup> Cf. BEAL & WICKERSHAM, *THE PRACTICE OF COLLECTIVE BARGAINING* 333 (1963).



from time to time accompanies the negotiation of collective agreements increasingly is being perceived as a national economic and political problem.<sup>114</sup> But it is at the point of contract formation that the problem exists, not in the performance and enforcement of the collective agreement.<sup>115</sup>

Even if it were otherwise, however, the engaging question would remain whether the Court's generous construction of arbitration and no-strike clauses is likely to be productive of industrial peace. This question should be refined before an answer is attempted. Although there is some doubt,<sup>116</sup> one may assume that neutral judicial enforcement of the promise to arbitrate and the promise not to strike would further the law's quest for industrial peace by deterring breach of contract.<sup>117</sup> No more is meant by neutral judicial enforcement than enforcement through rules of interpretation that are designed with the single purpose of effectuating the sense of the collective agreement—rules that reflect a sympathetic concern for the goal of freedom of contract. With this concession made to judicial enforcement, the question becomes whether the compulsory or noncontractual aspects of the Court's rules further industrial peace. Put another way, is compulsory arbitration of grievances and a compulsory ban on strikes over arbitrable grievances likely to be productive of industrial peace? I venture to answer that they are not. Consider the *Lucas Flour* rule which by fiat prohibits strikes over arbitrable grievances. Unions are not likely to strike over such grievances; when they do, feelings must be running very high indeed. And when feelings run high is it likely that the consequences will be altered by the legal rule? Mr. Paul Jacobs' observations are suggestive:

Quite apart from the important policy questions that a prohibition against strikes raises for a free society . . . another consideration must be taken into account: it is impossible to carry out such a policy in America.

Union members can always find other ways than the formal, legal strike for achieving their purposes even over the opposition of their leaders. If they are sufficiently ingenious, they can always slow down operations legally, and if this is done by enough employees it will have the same effect as an actual strike.<sup>118</sup>

<sup>114</sup> See Williams, *Settlement of Labor Disputes in Industries Affected With a National Interest*, 49 A.B.A.J. 862 (1963).

<sup>115</sup> See Wellington, *The Future of Collective Bargaining*, The New Republic, May 21, 1962, p. 12.

<sup>116</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting).

<sup>117</sup> See generally Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635 (1959).

<sup>118</sup> JACOBS, *OLD BEFORE ITS TIME: COLLECTIVE BARGAINING* AT 28, at 15 (1963).

Consider the rule in *Warrior* and *Enterprise* that forces an employer to arbitrate a dispute he has not agreed to arbitrate. The union would not have struck over the dispute unless it considered that dispute very serious indeed. Now, if the employer is ultimately successful in the arbitration, is there reason to suppose that the union will be contained if it would not have been contained in the absence of the arbitration? Perhaps, but here too Mr. Jacobs' words are suggestive. Moreover, arbitration may accomplish no more than to postpone economic combat to the time of contract renegotiation. This surely is a likely consequence if the ultimate result of the compulsory arbitration is a decision against the employer and the issue is one about which he feels strongly.<sup>119</sup>

The point, at least in part, is that it is misleading to think of a collective bargaining agreement as an ordinary contract for a fixed term. Many commercial contracts are just that; and after the term is over, the association is ended. A collective bargaining agreement, however, is one episode in a continuing, joint history of a firm and union. It is a temporary calm in a restless, shifting relationship. Accordingly, to attempt to compel the employer or the union during contract time to yield on a deeply felt issue about which it never consented to yield is not to resolve that issue. Rather—if it has any consequence at all—it is to delay ultimate resolution to a time when the parties are freed from governmental constraint.<sup>120</sup> At that time—the time of contract formation—economic combat may be the means of decision. For at that time, the law's interest is not primarily with economic peace, but with freedom of contract.<sup>121</sup>

I have suggested that the decisions of the Supreme Court in the contract enforcement area have sacrificed freedom of contract in an illusory quest for industrial peace. It may be asserted, however, on the basis of what I have said, that while the goal of industrial peace has not been served by the Court's rules, no serious long-run interference has been worked with freedom of contract. After all, the rules developed by the Court are rules of construction which can be avoided by explicit language in the collective agreement.<sup>122</sup> A closely limited

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<sup>119</sup> See Shulman, *supra* note 112.

<sup>120</sup> See Hays, *supra* note 105, at 925.

<sup>121</sup> See text accompanying notes 33-51 *supra*.

<sup>122</sup> The rhetoric of the opinions at least suggests that the parties have the power to overcome the rules of construction imposed upon them by the Court. It may be, however, that the Court's quest for industrial peace will make it very difficult for the parties—even assuming a harmony of desire—to overcome the Court's rules. Rules may sound permissive but be obligatory. Cf. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

arbitration provision can be written.<sup>123</sup> A no-no-strike clause may present some grammatical difficulties, but it is not beyond the competence of the draftsman.

Professor Hays spoke to this issue in relation to the arbitration cases and his words are relevant to *Lucas Flour* as well.

The vast majority of collective agreements now in effect contain arbitration clauses that do not expressly exclude from arbitration all matters which the parties did not consider arbitrable. These clauses will, of course, be subject to the interpretation that the Court has formulated. When the time comes for renegotiating the existing collective agreements, the attempt to transfer material to the arbitration clause, and to broaden the exceptions that are to be included in that clause, will meet with difficulty and resistance. Strikes over arbitration clauses have become fairly common recently. The Court's position is certain to add to their number. In other words, as with so many efforts of well-meaning law makers, the Court, in its attempt to enhance the stability of labor relations, may have succeeded in unstabilizing them to a considerable extent, at least temporarily.<sup>124</sup>

Professor Hays has properly stressed the short-run intrusion upon freedom of contract. But it is also true that the balance of bargaining advantage is shifted permanently when the law erects presumptions of the sort found in the arbitration and no-strike cases.<sup>125</sup> For example, it is, I should think, usually much easier for a union successfully to resist the inclusion of a no-strike clause in a collective agreement than

<sup>123</sup> General Electric is the company that probably has invested more time and effort than any other on this. It is reported that the new contract between G.E. and International Union of Electrical Workers,

will permit arbitration of both disciplinary issues and questions of contract interpretation. But it specifies certain underlying principles for arbitrators and courts to follow.

The main principle sought to be established by GE is that "the company retains all its historic rights to manage the business subject only to the express limitations set forth in this agreement."

Grievances are to be considered arbitrable only if they allege a violation of a specific provision and the violation has a "direct relationship to the primary, well-understood purpose of the contractual provision in question rather than an indirect or implied relationship."

When the parties go to court in a dispute over arbitrability, GE wants it understood that "the court will not indulge in any presumption that a demand to arbitrate is arbitrable." Arbitration should not be ordered unless the court finds "that the parties clearly intended that the question or questions involved in the demand would be arbitrable."

1 LAB. REL. REP. (54 L.R.R.M.) 97-98 (Sept. 30, 1963).

<sup>124</sup> Hays, *supra* note 105, at 925.

<sup>125</sup> Of course it is only in the short run—that is, with respect to existing contracts—that the Court's decisions upset reasonable expectations. But in the long run—that is, prospectively—they will have the effect, in many situations, of influencing the substantive terms of the agreement. The consequences of the decisions in this regard are similar to, but not nearly as effective as, a mandatory rule of law which, e.g., writes a no-strike clause into every collective agreement.

it is for the union to obtain a clause permitting a strike over an arbitrable grievance. And in the negotiation of the agreement it may be difficult indeed for the employer successfully to insist on a detailed and explicit catalogue of exceptions to arbitration.

The Supreme Court decisions plainly have shifted the burden of obtaining contract language that orders the future from union to employer in the arbitration area and from employer to union in the strike area. This insures that "the new court-made contract" will, in the words of Mr. Justice Black, "better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation."<sup>126</sup>

In its contract enforcement decisions, then, the Court has done exactly what it said, in the good faith cases, should not be done. It has erected a labor policy "on a foundation of government control of the results of negotiations."<sup>127</sup>

## V. CONCLUSION

The analysis I have attempted hopefully suggests more than that the contract enforcement cases were badly reasoned or wrongly decided; more than that these cases are inconsistent in approach with the cases in the duty-to-bargain area. The analysis also suggests something about the strength and weaknesses of courts as institutions for formulating and effectuating public policy.

The freedom of contract dogma, championed here in its application to the collective bargaining agreement, often has been rejected in other areas of contract law.<sup>128</sup> The rejection often has been in the name of public policy; and often it has been a wise rejection indeed.<sup>129</sup> Examples can be found in the area of contract formation as well as in that of contract performance.<sup>130</sup> The movement surely is quickening; and the scholarly comment upon it has kept pace.<sup>131</sup>

<sup>126</sup> Local 174, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 108 (1962) (dissenting opinion).

<sup>127</sup> *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490 (1960).

<sup>128</sup> *E.g.*, insurance. See generally Kessler, *Forces Shaping the Insurance Contract*, 1954 *Ins. L.J.* 151, 153.

<sup>129</sup> For case and textual material about the problems of freedom of contract, see SHEPHERD & SHER, *LAW IN SOCIETY—AN INTRODUCTION TO FREEDOM OF CONTRACT* (1960).

<sup>130</sup> See, *e.g.*, *Seidlitz v. Auerbach*, 230 N.Y. 167, 129 N.E. 461 (1920) (stipulated damage clause in a carefully drafted document struck down as penalty where there was no obvious imbalance of bargaining power); *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) (good faith read into a carefully drafted document—where there was no obvious imbalance of bargaining power—to satisfy consideration requirement).

<sup>131</sup> See, *e.g.*, FRIEDMANN, *LAW IN A CHANGING SOCIETY* 90-125 (1950); HAVINGHURST, *THE NATURE OF PRIVATE CONTRACT* ch. 3 (1961); PARRY, *THE SANCTITY OF*

One might think, for example, of the challenge to freedom of contract offered by the standardized contract—that is, an agreement which, “once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service.”<sup>132</sup> Professor Kessler suggests that:

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way if at all.<sup>133</sup>

And Professor Llewellyn points to the difficulty with judicial response to the problems posed by such contracts, while, at the same time, calling for judicial action:

[T]he examination of the standardized contract of a particular modern line of trade to distinguish clauses serving the better functioning of the work from those inspired by the sole interest of the higher contracting party . . . is not a task for which a common-law judge's equipment has peculiarly fitted him. . . . Nor do I think it will ever so fit him fully. But what it does fit him for is to see that there is such a distinction; to see that free contract presupposes free bargaining; and that where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.<sup>134</sup>

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CONTRACTS IN ENGLISH LAW ch. 3-4 (1959); Grunfeld, *Reform in the Law of Contract*, 24 MODERN L. REV. 63 (1961); Kessler, *Forces Shaping the Insurance Contract*, 1954 INS. L.J. 151; Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Schultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROB. 376 (1950); Sales, *Standard Form Contracts*, 16 MODERN L. REV. 318 (1953). A few modern classics are: Kessler, *Contracts of Adhesion, Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939); Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937); Llewellyn, “*What Price Contract—An Essay in Perspective*,” 40 YALE L.J. 704 (1931); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Wiliston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

<sup>132</sup> Kessler, *Contracts of Adhesion—Some Thoughts on Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

<sup>133</sup> *Id.* at 632.

<sup>134</sup> Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939).

This is true, but one should observe the limits of the positions stated. Judge Clark, in a well-known case<sup>135</sup> involving an automobile dealership contract, is suggestive. The Ford Motor Company had terminated a dealership in accordance with the language of an agreement but allegedly without provocation. The contract between the dealer and the company was standard. It had been drafted by Ford's lawyers, and it was one-sided. The termination section provided that the "agreement may be terminated at any time at the will of either party by written notice . . . ." <sup>136</sup> In response to the dealer's contention that the contract should be read to permit termination only in good faith, Judge Clark had this to say:

With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an over-riding requirement of public policy. This seems an extreme step for judges to take. The onerous nature of the contract for the successful dealer and the hardship which cancellation may bring him have caused some writers to advocate it, however; and an occasional case has seized upon elements of overreaching to come to such a result on particular facts. . . . But generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains.<sup>137</sup>

Several factors persuaded Judge Clark not to convert the contract of the parties into a "new court-made contract." The dealer knew what he was getting into; it would have been factitious for the court to use the techniques of interpretation or construction in order to fashion a seemingly less harsh bargain;<sup>138</sup> it was simply not clear that, as a matter of comparative competence, the court could make

<sup>135</sup> *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940). On problems of automobile dealership contracts generally, see Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957).

<sup>136</sup> *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, *supra* note 135, at 676.

<sup>137</sup> *Id.* at 677.

<sup>138</sup> On some of the evils of using "interpretation" to reach results that are unrelated to the sense of the bargain see Kessler, *Contracts of Adhesion—Some Thoughts on Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

(and, in the case of good faith, administer) an agreement that would serve society better than the parties had. It is one thing for a court to rewrite a contract when one of the parties does not know what he is agreeing to; it is something else when there is full understanding on both sides. In the first situation, the court's vision is fixed on the parties before it, one of whom needs protection.<sup>139</sup> In the second situation, there is little reason to suppose that the parties need protection, unless of course contracting was a near-necessity for the weaker party and there was no reasonable alternative open to him.<sup>140</sup> Accordingly, for a court actively to intrude itself in this second situation suggests that its vision is fixed on some supposed societal interest that transcends the interest of the contracting parties. Here it is that courts must proceed, if at all, with extreme caution. For there is the danger of introducing into the law unnecessary instability by departing from the reasoned elaboration of prior decisions and substituting, as the rule of decision, the judge's notion of the good society.<sup>141</sup> As Judge Clark suggests, there often is little reason to be sanguine about that notion. It may be said that courts "have not proper facilities to weigh economic factors, nor have [they] before [them] a showing of the supposed needs which may lead . . . to . . . seemingly harsh bargains."<sup>142</sup>

Consider now the collective bargaining agreement. The parties knew what they were agreeing to. It was factitious for the Court to use techniques of interpretation to reshape the agreement. It should be clear that the parties are more competent than the Court; and that the Court engaged in an unwise discretionary choice when it erected the rules it did in the arbitration and strike cases. Moreover, unlike the automobile dealership case, there is no felt inequality of bargaining power between union and employer.<sup>143</sup> It is the existence of such inequality that often explains judicial interference with freedom of

<sup>139</sup> See Kessler, *Contracts of Adhesion—Some Thoughts on Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

<sup>140</sup> See, e.g., *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873) (limitation of liability, imposed by carrier on shipper, struck down as unreasonable).

<sup>141</sup> Cf. Hart & Sacks, *The Legal Process—Basic Problems in the Making and Application of Law* 386-400 (tent. ed. 1958). "Would it be possible for people to anticipate decisions of the type supposed at the time of primary activity [negotiation and administration of contract], or at the time when a dispute first arose? If not, what would be the effect of such decisions on the process of private ordering [negotiation and administration of contract]? On the process of private settlement, and on the volume of litigation?" *Id.* at 398.

<sup>142</sup> 116 F.2d at 677.

<sup>143</sup> Indeed, as Professor Cox has said: "The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards." Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958).

contract.<sup>144</sup> Judge Clark, in his case, resisted the pressure generated by a notorious imbalance of economic power for reasons that he took to be more weighty. Those reasons are germane to the labor cases. The countervailing pressure of a bargaining imbalance is absent. Therefore it may truly be said that the Court's noble and well-intentioned quest for industrial peace in the enforcement cases has launched it on a legislative program which is institutionally unsound and substantively unwise.

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<sup>144</sup> See generally Hart & Sacks, *op. cit. supra* note 141, at 232-63.